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IN THE

Supreme Court of the United States

No. 313

BERT SMITH,

Petitioner,

v.

J. TURNER BUTLER and
WILLIAM A. HALLOWES, III,
as Trustees of the Property of the
FLORIDA EAST COAST RAILROAD COMPANY,
a Florida corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENTS

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THIRD DISTRICT

BRIEF OF RESPONDENTS

I. JURISDICTION

Petitioner has sought jurisdiction of this Court under the provisions of Title 28 U.S.C.A., Section 1257 (3). The Petition for Certiorari was granted by this Court and the case transferred to the summary calendar. (R. 370).

II. STATUTES INVOLVED.

The Statutes involved herein are the **Federal Employers' Liability Act**, 35 Stat. 65, as amended, 45 **U.S.C.**, Section 51, et seq., and the **Railway Labor Act**, 44 Stat. 577, as amended, 45 **U.S.C.**, Section 151, et seq.

III. QUESTIONS PRESENTED.

Respondents submit that the real questions submitted to this Court for determination are as follows:

FIRST QUESTION

WHETHER OR NOT THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, ERRED IN HOLDING THAT PETITIONER HAD NO CAUSE OF ACTION AGAINST RESPONDENTS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT FOR AN ALLEGED INJURY FROM A FALL SUSTAINED DURING THE COURSE OF A PROPERLY AUTHORIZED TEST GIVEN PETITIONER TO DETERMINE HIS QUALIFICATIONS TO PERFORM HIS REQUIRED DUTIES AS A FLAGMAN SOLELY UPON THE CLAIM THAT RESPONDENTS HAD NO RIGHT TO GIVE SUCH A TEST, PETITIONER HAVING EXPRESSED HIS ANXIOUSNESS TO PERFORM THE TEST, AND HAVING ABANDONED ALL CLAIMS OF NEGLIGENCE FOR FAILURE TO EXERCISE REASONABLE CARE IN FURNISHING A SAFE PLACE IN WHICH, AND EQUIPMENT WITH WHICH,

TO WORK, AND HAVING ABANDONED HIS CLAIM OF NEGLIGENCE AGAINST RESPONDENTS IN REQUIRING PETITIONER TO TAKE THE TEST, KNOWING PETITIONER WAS IN A WEAKENED PHYSICAL CONDITION?

SECOND QUESTION

WHETHER OR NOT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW BY CERTIORARI DECISION OF HIGHEST COURT OF STATE WHEN FEDERAL QUESTION WAS NOT NECESSARY TO DETERMINATION OF CAUSE IN STATE COURT AND JUDGMENT FOR RESPONDENTS IS ADEQUATELY SUPPORTED ON A NON FEDERAL GROUND?

IV. STATEMENT OF THE CASE.

References herein made to the original record and to the appendices of the parties will be prefaced by the following symbols:

"R" — for original Record

"R. App." — for Respondents' Appendix

Petitioner's Complaint contains eight separate allegations of negligence, which we quote (R. 2):

*"(a) In negligently and unlawfully requiring the plaintiff to participate in such a 'field test';

*"(b) In negligently allowing its servants, agents or supervisors to conduct such a 'field test';

"(c) In negligently furnishing the plaintiff a dangerous and unsafe location at or upon which to engage in such a 'field test';

"(d) In negligently furnishing to plaintiff a dangerous and unsafe place at or upon which to work;

"(e) In failing to use ordinary care in providing the plaintiff a reasonably safe place to work;

"(f) In failing to provide the plaintiff with a reasonably safe place to work;

"(g) In negligently failing to provide the plaintiff with proper equipment and safeguards in performance of his duties and in the participation in such a 'field test';

"(h) In failing to provide adequate supervision and instructions governing the conduct of said 'field test'."

The first two allegations of negligence seek, allegedly under the **Federal Employers' Liability Act**, to con-

*These allegations are the only ones remaining in this cause, all others having been abandoned by Petitioner.

test Respondents' **right** to give the test at all. (R. 2). The District Court of Appeal of Florida, Third District, held, on the first appeal, that Petitioner could not raise, under the **Federal Employers' Liability Act**, any issue as to the right of Respondents to give the test, but that if he were aggrieved by virtue thereof, his claim for grievance was exclusively under the provisions of the **Railway Labor Act**, Title 45 U.S.C.A., Section 151, et seq. (R. 325-329), the Court stating: (R. 327):

> " . . . There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C., §151 et seq. Consequently we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. The real issue in the case, which was apparently forgotten, was whether the appellant provided a reasonably safe place for appellee to work or perform the duties assigned him. Seaboard Air Line R. Co. v. Gentry, Fla. 1950, 46 So.2d 485; Seaboard Air Line R. Co. v. Hardee, Fla. 1951, 54 So.2d 809."

The Florida Court held that the first two charges of negligence did not present triable issues. (R. 325-329). The cause was remanded for re-trial, because of the "emotional prejudice" engendered into the minds of the jury by Petitioner's counsel on "an immaterial issue" denying Respondents a "fair and impartial trial of their cause". (R.. 327-329)

Upon remand to the trial court, Petitioner refused to try the cause upon, and abandoned, the remaining six allegations of negligence, and elected to proceed solely upon the allegations predicated upon the right of Respondents to give the Petitioner a test at all, and, also, amended his Complaint to add a third allegation of negligence, to-wit: that Respondents were negligent in "requiring Bert Smith, knowing his physical condition, to take the field test." (R. 349, 350). Petitioner proffered the entire testimony in the first trial upon these issues, which proffer the trial court held inadmissible. (R. 369). The trial court directed a verdict for Respondents, and Final Judgment for Respondents was thereupon entered. (R. 362-364).

Upon appeal to the District Court of Appeal of Florida, Third District, from the Final Judgment entered upon the directed verdict for the Respondents, the judgment was affirmed upon the authority of the former decision of that Appellate Court. (R. 368, 369). It is to be emphasized that upon this second appeal to the Florida Appellate Court, Petitioner expressly abandoned the third allegation of negligence, which he made by amendment at the last trial (i.e. that Respondents were negligent in requiring Petitioner to take the test, knowing of his physical condition), and relied solely upon the original first two allegations of negligence. We quote from Petitioner's Brief, filed with the District Court of Appeal of Florida, Third District, on the second appeal (p. 3):

> "During the proceedings on remand, counsel for Mr. Smith were allowed to amend the complaint to add a third charge of negligence which the trial judge then held insufficient under this

Court's decision. (R. 541-555) However, in the interest of simplifying the issues we expressly abandon this third charge and present this appeal solely on the same two charges held insufficient on the first appeal."

Respondents feel it necessary to clarify some of the misstatements made by Petitioner in his Statement of the Case, as well as to supply some important facts reflected by the Record, which Petitioner has omitted.

As of September, 1956, the Petitioner had been working some thirty-six years on the Railroad, both as a flagman and as a baggageman, having worked the last five years almost exclusively as a flagman on a passenger train. (R. 135, 142, 143). He was then sixty-one years old, weighed about 262 pounds, having reduced his weight from 327 pounds, and was about 5 feet 3 inches tall. (R. 75, 87, 88, 135, 137). Since 1942, Petitioner had had trouble with arthritis (R. 173). His chronic obesity (R. 105, 172), added to his arthritic difficulties, because his heavy weight put more strain than ordinary upon his joints. (R. 185). His arthritis was getting progressively worse. (R. 171-173). In March, 1956, Petitioner consulted an orthopedic surgeon for arthritis in his left knee and was treated by him until May. (R. 182-184). He was confined and treated in the East Coast Hospital Association hospital in St. Augustine, Florida, from May 21st through June 30th, 1956, for arthritis and for a bladder infection. (R. 74). He returned home to Miami, where he received further treatment for his knee, and then returned to work on August 16, 1956. (R. 74, 75).

Although the Petitioner's work as a flagman is mos[illegible]y

occupied with inspecting the train, both prior to departure and while the train is in motion, his chief duty and the main purpose for his being on the train is, in the event of an emergency stop, to protect the rear of that train from other trains which may be approaching on the same track. (R. 143, 144). This must be done at all hours of the day or night, and regardless of weather conditions or anything else. (R. 60, 144). Under such circumstances, the Respondents' rules require (R. 57, 53):

> "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees."

The flagman, by Petitioner's own admission, must go back at least as far as the last signal block (the signal blocks being about a mile apart), in order to flag the train (R. 19, 146), in the event the signal block might be inoperative (R. 221). Unless the train happens to stop right at one of the signal blocks, the flagman must go back even farther than the last signal block to flag an approaching train, since he is required to place two torpedoes on the track a sufficient distance back from his train that an approaching train on the same track will run over the torpedoes, explode them, and the engineer, hearing the explosion, can stop his train in time to avoid a collision. (R. 20, 21, 57, 58, 123, 124, 145, 146). This means he should go back at least a mile, since it would take a passenger train approximately a mile, traveling at the maximum speed permissible, to stop. (R. 45, 46). Even though an approaching train might be stopped in less than

a mile by an emergency application of the brakes, such stops are carefully avoided, if at all possible, in order to prevent injury to the many passengers on board. (R. 46). In addition to placing the torpedoes on the track, the flagman is required to drop lighted fusees, or flares, as additional warning to the approaching train. (R. 20-23, 57, 58). Petitioner, by his own testimony, admitted having walked a mile along the railroad track on various emergency occasions in order to protect the rear of his train in the course of his duties as a flagman. (R. 145, 147, 148).

After Petitioner's return to work, he was observed by Respondents' trainmaster, Mr. Clark, to be having difficulty both in getting on and off the train and in walking around the passenger trains to inspect the brakes—a visual brake inspection required of a flagman—which exhausted Petitioner. (R. 58, 59). From these observations, Mr. Clark felt that Petitioner was unable to "properly" perform the duties required of a flagman in an emergency situation. (R. 58, 59). Petitioner had been allowed by his local physician to return to work after treatment for his knee, but, as Mr. Clark stated, his physician had no facilities for conducting the test of a man's ability to perform his required duties, nor the opportunity for the observation of the man in the actual performance of his duties. (R. 24) Petitioner's physical examination by Dr. Lockwood in the East Coast Hospital Association Hospital on September 12, 1956, was for the represented purpose of obtaining a life insurance policy. (R. 75)

Mr. Clark, as trainmaster, was, under Respondents' rules, in "charge of the immediate train and yard service, of the movement of traffic *** and of the employees engaged therein," and, "responsible for the organization

of train crews and for the maintenance of an adequate force in the train service." (R. 53) Because of this responsibility, and his responsibility for the safety of the traveling public, Mr. Clark went to Petitioner, discussed with Petitioner his condition and ability to perform his duties, and asked Petitioner if he desired to retire. (R. 59, 60) Petitioner replied, no, that he anticipated working four or five more years. (R. 59, 60)

Mr. Clark then wrote to Respondents' general superintendent, I. E. Hamilton, advising him of his observations of Petitioner, and stating that should conditions arise requiring Petitioner to go to the rear of the train to flag, he did not feel Petitioner could do so properly. (R. 27, 53, 54, 58-60, 65, 66) Mr. Hamilton responded by authorizing a field test to be conducted to determine Petitioner's ability to adequately perform his required duties. (R. 26, 27, 54, 60, 66)

The actual field test was merely that which Petitioner's duty would require him to do so as to flag a train in an emergency condition (R. 20, 21, 57, 58, 123, 124, 145, 146), namely, walk a mile along the railroad track. (R. 40) This was a test which Respondents' officials had unquestioned (even by the General Chairman of the Brotherhood of Railway Trainmen) authority to give Petitioner. (R. 126-128) And, as to the propriety of the type of test to be given, the Brotherhood Chairman stated that it was the only kind of qualification test you could give a flagman. (R. 114, 155)

Petitioner has erroneously tried to give this Court the impression that no field test or efficiency test had ever been given by the Railroad to any other employee.

Although this was the first test given a flagman by Respondents, they had many times given efficiency tests in the field to various employees to determine their capability to properly do their job, including engineers and firemen. (R. 126, 127, 202) Such tests were given under what would be described as simulated emergency conditions. (R. 127)

Petitioner's statement that Respondents' supervisor "admittedly devised a test which he believed Petitioner was physically unable to perform" is not only a misstatement of fact, but calculated to mislead the Court to believe that someone deliberately sat down and devised some type of test which was impossible for anyone to pass, and which had no relationship to Petitioner's actual duties. The test, as above stated, was merely that which Petitioner's duties might at any time require him to do, and Mr. Clark's expressed belief was not that Petitioner could not possibly perform the test, but that he could not perform his required duties "properly". (R. 53, 54, 65, 67, 68) Petitioner expressed to Mr. Clark his anxiousness to perform the test as to demonstrate his ability to do his job properly. (R. 35)

Petitioner was advised he could have a representative with him at the test, and he brought with him both the Chairman of the Brotherhood of Railway Trainmen, Mr. Baumberger, and the General Chairman of the Order of Railway Conductors and Brakemen, Mr. Delk. (R. 35, 60) As far as the actual test is concerned, Mr. Clark and Mr. Johnson, Respondents' road foreman of engines, as representatives of the Railroad, and Mr. Delk and Mr. Baumberger, all participated in the test by walking the mile on the railroad track; Mr. Clark and Mr. Johnson

walked the entire distance in nineteen minutes, while Mr. Delk and Mr. Baumberger took twenty-three minutes. (R. 62, 102, 103, 115-120, 199) Petitioner proved Mr. Clark's prior observations of him to be accurate, and justified his fear that Petitioner was unable to properly perform his duties, by failing to complete the mile walk and actually covering only about 3,000 feet of the 5,280 feet distance, and taking thirty-two minutes to do that. (R. 69) While Petitioner sought to attribute his fall to water from gopherberry leaves on which he allegedly stepped, making his shoes slippery (R. 139), Mr. Delk attributed Petitioner's fall to utter exhaustion. (R. 241) Petitioner was the only one of the five men walking the mile who fell. (R. 160)

Petitioner's claim for damages was limited to an alleged aggravation of pre-existing arthritis in the left knee. (R. 83-85)

V. SUMMARY OF ARGUMENT.

The District Court of Appeal of Florida, Third Distrist, properly held that the Petitioner's first two allegations of negligence in his Complaint did not state claims cognizable under the Federal Employers' Liability Act, but were matters remediable, if at all, only under the Railway Labor Act, because:

1) Petitioner's first two allegations of negligence in his Complaint were directed to and questioned only the "right" of the Respondents to require Petitioner to take a field test to determine his qualifications to continue to perform his required duties.

2) The "right" of the Respondents to require the Petitioner to take a field test to determine his qualifications to continue to perform his required duties was a labor grievance over which the National Railroad Adjustment Board under the Railway Labor Act had exclusive jurisdiction.

3) When the National Railroad Adjustment Board under the Railway Labor Act has exclusive jurisdiction, no Court, State or Federal, has the power under the guise of any other Act to exercise jurisdiction.

4) If the Federal Employers' Liability Act were extended to cover claims contesting the "right" of an employer to require a field test, it would open the door to countless claims of damages for personal injury based upon nothing more by way of alleged negligence than the fact that an employee was injured while doing something in response to a proper order by his superiors.

5) The decision of the Florida Appellate Court was not necessary upon a federal question and there is an adequate non-federal ground which supports the decision, leaving this Court without jurisdiction of this cause.

VI. ARGUMENT.

FIRST QUESTION

WHETHER OR NOT THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, ERRED IN HOLDING THAT PETITIONER HAD NO CAUSE OF ACTION AGAINST RESPONDENTS UNDER THE FEDERAL EM-

PLOYERS' LIABILITY ACT FOR AN ALLEGED INJURY FROM A FALL SUSTAINED DURING THE COURSE OF A PROPERLY AUTHORIZED TEST GIVEN PETITIONER TO DETERMINE HIS QUALIFICATIONS TO PERFORM HIS REQUIRED DUTIES AS A FLAGMAN SOLELY UPON THE CLAIM THAT RESPONDENTS HAD NO RIGHT TO GIVE SUCH A TEST, PETITIONER HAVING EXPRESSED HIS ANXIOUSNESS TO PERFORM THE TEST, AND HAVING ABANDONED ALL CLAIMS OF NEGLIGENCE FOR FAILURE TO EXERCISE REASONABLE CARE IN FURNISHING A SAFE PLACE IN WHICH, AND EQUIPMENT WITH WHICH, TO WORK, AND HAVING ABANDONED HIS CLAIM OF NEGLIGENCE AGAINST RESPONDENTS IN REQUIRING PETITIONER TO TAKE THE TEST, KNOWING PETITIONER WAS IN A WEAKENED PHYSICAL CONDITION?

Petitioner's emotional play, which began with the trial jury and which is repeated in Petitioner's Petition for Writ of Certiorari and in his Brief filed with this Court, that Respondents were "out to get him" (Petitioner) is clearly unsupported by the record in this cause, as the test was not only within the admitted authority of Respondents to require, but was nothing more stringent than Petitioner's own job required him to do; and upon Petitioner's ability to properly perform his duties depended the lives of thousands of passengers and other employees of Respondents' railway. As regrettable as Petitioner's failure to pass the test and his fall may have

been, the giving of the test may well have resulted in the saving of many lives and property.

This emotional play and Petitioner's vivid description of the rocks and gopherberry leaves, etc., and of the details of the walk itself, as well as of his injuries, have no place in this proceeding before this Court, as Petitioner has expressly abandoned his allegations of negligence under the Federal Employers' Liability Act with respect to the alleged failure of Respondents to furnish him with a reasonably safe place in which, and safe equipment with which to work or take the test, which the Florida Appellate Court held to have raised justiciable issues, but which Petitioner declined to go to trial upon.

It is to be pointed out that the Petition for Writ of Certiorari and Petitioner's Brief have circumvented the real issue in this proceeding, to-wit: Whether or not the Respondents had the **right** to require Petitioner to take the test, which was the basis of Petitioner's first two allegations of negligence in the Complaint, and, in this Court, for the first time in this proceeding, now seeks to imply that Petitioner was traveling upon an allegedly improperly conducted field test. It is significant to point out that neither the first nor second allegation of negligence in the Complaint asserted that Respondents conducted the field test in a negligent or improper manner, but asserted that Respondents negligently required the Petitioner to participate in the test and negligently allowed its servants, agents or supervisors to conduct the test. (R. 2) Indeed, the Florida District Court of Appeal, in its first decision emphasized that Petitioner's first two allegations of negligence related to and questioned the

Respondents' **right** to require Petitioner to take the test when it stated (R. 327, 328):

> **"There was no justiciable issue, at lease under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test."**
>
> "...
>
> **"The appellee's entire case as reflected by this record conclusively indicates that it was premised upon the claim that appellant's conduct in requiring the appellee to take a field test was unlawful and that all of his injuries and damages resulted from such unlawful act."**

The Florida Appellate Court, in its second decision, to which the Petition for Certiorari is directed, again emphasized that Petitioner's first two allegations of negligence in his Complaint, upon which he elected to stand exclusively at the second trial, questioned only Respondents' **right** to give Petitioner the field test when it stated (R. 368):

> "This cause appeared before this court upon a prior appeal. See Butler v. Smith, Fla. App. 1958, 104 So.2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim under the Federal Employers' Liability Act, **that the railroad had no right to give the field test."**

That this was the effect of Petitioner's first two charges of negligence is admitted by Petitioner's acts at the second trial, after remand of the case to the trial court from the Florida District Court of Appeal, in amending his Complaint to add an additional allegation of negligence, to-wit: That Respondents were negligent in "requiring Bert Smith, knowing his physical condition, to take the field test." (R. 349-350) But, this additional allegation, made by amendment, was expressly abandoned by Petitioner in his Brief on the appeal taken by Petitioner to the District Court of Appeal of Florida, Third District, from the Final Judgment for the Respondents. (see page 6, supra). Thus, the sole claim left and upon which Petitioner solely relied for recovery was directed to the right of the Respondents to require Petitioner to take the test at all. This is confirmed by Petitioner's counsel in his statement at the pre-trial conference before the trial Court (R. 337):

> " . . . our whole position in this case is that requiring this fellow to take this test, and conduct this thing, was the negligence in the case and a violation of F.E.L.A."

The Florida District Court of Appeal quite correctly determined that such a claim was not cognizable to predicate liability under the Federal Employers' Liability Act, but, if a grievance, was remediable under the Railway Labor Act. Petitioner's argument that Respondents' theory of this case is that the Railway Labor Act limits the Federal Employers' Liability Act concept of negligence, demonstrates Petitioner's misunderstanding, not only of Respondents' position, but of the real question herein involved. The decision of the Florida Appellate Court de-

cided nothing but that the sole remaining allegations relied upon by Petitioner, relating to Respondents' right to give the test, were matters cognizable only under that Act in which the matter of railroad employees' ability to perform their job, and of requiring a field test to so determine, has always been cognizable—the Railway Labor Act. If the Federal Employers' Liability Act were extended to cover claims of the nature relied upon here by Petitioner, it would open the door to countless claims for personal injury, based upon nothing more by way of alleged negligence than the fact that an employee was injured while doing something in response to a proper order by superiors, which the employee decides afterward he will claim should not have been given at all. It would likewise place back in the laps of the Courts labor grievances—the very thing that the Railway Labor Act was designed to alleviate and avoid—under the guise of an F.E.L.A. damage claim. Such was not the intention of Congress, nor have the Courts held it to be so.

Respondents have quoted in the Appendix to this Brief pertinent provisions of the Railway Labor Act. (R. App. 1-11) Its purposes are set forth in Section 151-a, Title 45, U.S.C.A. (R. App. 1-2), and are stated by this Court in **Union Pacific R. Co. v. Price,** 360 U.S. 601, 3 L.Ed.2d 1460, 79 S.Ct.Rep.1351 (360 at p. 609):

"...

"The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service,

and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.' HR.Rep. No. 328, 69th Cong. 1st Sess. p, 1. . ."

The Railway Labor Act was specifically "passed to aid in solving problems which arise out of the relation of employer and employee engaged in Interstate Commerce." **Brand** v. **Penn. R. Co.** (DC Ed.Pa.) 22 F.Supp.569. The Act establishes the National Railroad Adjustment Board and preseribes for its membership and for its jurisdiction over disputes arising out of "grievances or out of the application or interpretation of a grievance covering rates of pay, rules or working conditions." Title 45, **U.S.C.A.** Section 151-a, 153. The Act "clearly includes within the term 'grievance' a dispute between the individual employee and the carrier." **Thomas** v. **New York, Chicago & St. Louis R. Co.** (CCA 6 Cir. 1950) 185 F.2d 614, 616. The Railway Labor Act also sets up the National Mediation Board, prescribes its membership and defines its jurisdiction, which, essentially, extends over matters not within the jurisdiction of the National Railroad Adjustment Board.

Since the passage of the Railway Labor Act, one of the classic fields in which the National Railroad Adjustment Board has exercised its conferred jurisdiction, on so many occasions, has been that involving disputes between the individual employee and the employer, with respect to the employee's ability and competency to perform the duties of his employment, in view of his physical condition, as well as the manner in which same should

be determined. Several of such disputes presented to and adjudicated by the National Railroad Adjustment Board and over which that Board expressly avowed jurisdiction, are reflected in the pertinent excerpts from some of such published Awards of the Board, incorporated in the Appendix to this Brief. (R. App. 11-40). The Board has, in innumerable instances, made its determination and award based upon the results of a field test ordered by the Board to be given the employee, E.g., Award No. 6202, First Division (R. App. 11-14); Award No. 6383, First Division (R. 14-16); See also Award No. 8394, Third Division; Award No. 977, Fourth Division; Award No. 12882, First Division; Award No. 14218, First Division; Award No. 14281, First Division; Award No. 1103, Fourth Division; Award No. 17523, First Division (R. App. 16-40). It has also confirmed the right of the employer to conduct field tests to determine the physical qualifications of its employees to perform their required duties. Award No. 8394, Third Division (R. App. 33-36). And, as stated by the Board in Award No. 17523, First Division:

"It is the undoubted perogative of management to determine the physical qualifications of its employees . . ." (R. App. 32).

Petitioner's statement on page 9 of his Brief that the National Railroad Adjustment Board does not have the power to award damages for tortious conduct is out of place and misses the point. It cannot be validly contended that the "right" to give Petitioner a field test involves tortious conduct. In case of **Greenwood v. Atcheson, Topeka & Santa Fe Ry. Co.** (DC S.D. Calif. 1955), 129 F. Supp. 105, the Court held as a matter of law that plaintiff had no cause of action under any of the provisions of the Federal Employers' Liability Act for an alleged wrongful dis-

charge of the plaintiff by the defendant, the Court stating (129 F. Supp. at p. 107):

"...

"... The liability created by the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., is a liability on the part of the employer to the employee for death or injury resulting in whole or in part from the *negligence* of any of the officers, agents or employees of the carrier, or from defects in appliances, etc., due to its negligence. There is no 'liability' created to continue a man in the carrier's employment" [Italics by the Court]

The principle of the **Greenwood** case is analagous here, since not only does the Federal Employers' Liability Act create no liability to continue a man in the carrier's employment, but it creates no liability upon the carrier for exercising its right to determine an employee's qualifications to continue to perform his required duty by giving him a qualification test.

Petitioner's sole remaining claim in this cause is one which historically has always been considered a labor grievance over which the National Railroad Adjustment Board, under the Railway Labor Act, has exclusive jurisdiction. When the Board has jurisdiction, no Court, State or Federal, has the power, under the guise of any other Act, to invade same. **Slocum** v. **Delaware L. & W. R. Co.** (1950) 339 U.S. 239, 70 S. Ct. Rep. 577, 94 L. Ed. 795; **Order of Ry. Conductors of America** v. **Southern Ry. Co.**, 339 U. S. 255, 70 S. Ct. Rep. 585, 94 L.Ed.2d 811; **Penn-**

sylvania R. Co. v. Day (1959), 360 U. S. 548, 79 S. Ct. Rep. 1322, 3 L.Ed.2d 1422.

In the **Slocum** case, this Court stated (339 U.S. at pp. 243, 244):

> " . . .
>
> "The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in Order of Conductors v. Pitney, supra. There we held, in a case remarkably similar to the one before us now, that the Federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents * * *.' Our ground for this holding was that the court 'should not have interpreted the contracts * * *' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U.S. at pages 567-568, 66 S. Ct. at page 325, 90 L. Ed. 318. **This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.**" [Emphasis supplied]

The doctrine of **exclusive primary jurisdiction** in the National Railroad Adjustment Board applies even though the employee may have retired from service and terminated the employer-employee relationship " . . . **if the**

claim arises out of the employment relationship which Congress regulated." **Pennsylvania R. Co. v. Day**, supra (360 U.S. at p. 552). This Court there said (360 U.S. at pp. 552, 553):

> " . . . The purpose of the Act is fulfilled if the claim itself arises out of the employment relationship which Congress regulated. The Board itself has accepted this construction and adjudicates the claims of retired employees.[2] This uniform administrative interpretation is of great importance, reflecting, as it does, the needs and fair expectations of the railroad industry for which Congress has provided what might be termed a charter for its internal government. Moreover, the discharged employee may challenge the validity of his discharge before the Board, seeking reinstatement and back pay. See Union Pacific R. Co. v. Price, infra, p. 1460. Thus it is plain both from a reading of the Act in light of its purpose and the needs of its administration and from the settled administrative interpretation that the Board has jurisdiction over respondent's claim for compensation.
>
> "Since the Board has jurisdiction, it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. A

contrary conclusion would create a not insubstantial class of preferred claimants.[3] Retired employees would be allowed to bypass the Board specially constituted for hearing railroad disputes whenever they deemed it advantageous to do so, whereas all other employees would be required to present their claims to the Board. This case forcefully illustrates the difficulties of such a construction. Several active workers have had claims similar to that of respondent rejected by the Board. To allow respondent now to try his claim in the District Court would only accentuate the danger of inequality of treatment and its consequent discontent which it was the aim of the Railway Labor Act to eliminate. . . ."

This Court has also held that in the event of any conflicts between the provisions of the Railway Labor Act and other statutes, State or Federal, the specific provisions of the Railway Labor Act shall predominate and exclusively apply. **Brotherhood of Railroad Trainmen** v. **Chicago River & Indiana R. Co.** (1957) 353 U.S. 30, 1 L.Ed. 2d 622, 77 S. Ct. 635, rehearing denied 353 U.S. 948, 77 S. Ct. Rep. 23, 1 L.Ed.2d 857; **State of California** v. **Taylor** (1957) 353 U.S. 553, 77 S. Ct. Rep. 1037, 1 L.Ed.2d 1034.

Neither the cases of **Barnes** v. **Public Belt Railroad Commission** (DC E.D. La. 1951) 101 F. Supp. 200, or **Borkovic** v. **Penn. R. Co.** (W.D. Pa. 1960), 180 F. Supp. 495 (cited by Petitioner), have any applicability to the instant case or the issue here involved. The **Barnes** case simply involved an action for damages under the Federal Employers' Liability Act for injuries sustained by a switchman who fell from the top of a car of a train which, it

was alleged and proved, negligently made an unexpected and unnecessary emergency stop. Plaintiff's claim for lost wages due directly to the result of his injury from defendant's negligence was held to be, as it always has been recognized, an item of damages incident to the claim for injuries under the Federal Employers' Liability Act. In the **Borkovic** case plaintiff was not injured while in the conduct of a test to determine his own qualifications, nor was any issue raised as to defendant's "right" to give the test in which plaintiff's fellow employees' qualifications were being determined. Nor was any contention advanced by the defendant that any of the plaintiff's asserted claims under the Federal Employers' Liability Act were cognizable only under the Railway Labor Act.

The language of the Court in **Urie** v. **Thompson**, 337 U.S. 163, 181, 182, quoted by Petitioner on Page 12 of his Brief, gives no solace to his position. The holding of the Florida Appellate Court that the allegation questioning the "right" of Respondents to require Petitioner to take a field test to be a labor grievance cognizable only under the Railway Labor Act, certainly places no restrictive covenants upon the provisions of the Federal Employers' Liability Act with respect to the employees covered, the cause of injury or the kind of injury resulting. Petitioner had six remaining allegations of negligence, which the Florida Appellate Court held were cognizable under the Federal Employers' Liability Act, but upon which Petitioner refused to proceed to trial.

SECOND QUESTION

WHETHER OR NOT THE SUPREME COURT OF THE UNITED STATES HAS JURISDIC-

TION TO REVIEW BY CERTIORARI DECISION OF HIGHEST COURT OF STATE WHEN FEDERAL QUESTION WAS NOT NECESSARY TO DETERMINATION OF CAUSE IN STATE COURT AND JUDGMENT FOR RESPONDENTS IS ADEQUATELY SUPPORTED ON A NON FEDERAL GROUND?

After remand of this cause by the Florida Appellate Court to the trial court on the first appeal, for re-trial upon the remaining six allegations of the Plaintiff's Complaint, the cause came on for trial, at which time Plaintiff elected to proceed only upon the first two allegations of negligence contained in the Plaintiff's Complaint, which the Florida Appellate Court had held not to present justiciable issues under the Federal Employers' Liability Act, and abandoned the remaining six allegations of negligence which related to the alleged failure of Respondents to exercise reasonable care to provide Petitioner with a safe place in which, and equipment with which, to work and take the test and the alleged failure of Respondents to provide adequate supervision and instruction in the conduct of the test. (R. 345, 346, 349, 350). Instead of actually trying the cause and presenting testimony on those two remaining allegations of negligence, Petitioner sought to proffer, upon the sole two remaining allegations of negligence, the written transcript of the entire testimony of the first trial without any showing that the witnesses who had testified in the former trial were unavailable or unable to appear at the second trial, over the strenuous objection of the Respondents. (R. 344, 345, 347-360). The trial court held the proffer "inadmissible". (R. 360).

Respondents' objection to the proffer and the form

thereof were twofold: (1) That the majority of the testimony of the former trial related solely to the remaining six allegations of negligence in Petitioner's Complaint, which Petitioner expressly abandoned at the second trial, after remand from the appellate court, whereas the second trial was upon that issue only, raised by the first two allegations in the Complaint, as to the "right" of Respondents to require Petitioner to take the test; (2) That Section 92.22 of the **Florida Statutes** prohibited the use of evidence adduced at a former trial unless the issues were substantially the same in both trials and unless a substantial reason be shown why the original witness or document was not produced. (R. 348-360).

The court properly held the proffer of the transcript of the entire testimony of the former trial inadmissible, since of the almost five hundred pages of testimony offered at the former trial, only a small portion related to the first two allegations of negligence, which the Florida Appellate Court held not to present triable issues under the Federal Employers' Liability Act, and it was not encumbent upon the trial court, nor the Florida Appellate Court, to sift through almost five hundred pages of testimony to ascertain which particular portion were material to the issues upon which Petitioner elected to go to trial upon. In addition, Section 92.22 of the **Florida Statutes** provides:

> "In the event it be made to appear to the satisfaction of the court that any evidence used at a trial of a civil case, whether oral or written, and incorporated in a bill of exceptions, or incorporated in the record proper can not be had, then the bill of exceptions taken at the trial, or

> the evidence incorporated in the record of the trial, may be used as evidence upon any subsequent trial or hearing of the case, or in any other civil cause or civil proceeding, as to any matter in issue at a previous trial or hearing; and, further, in the event that such evidence is not so preserved as before stated, then the same may be used at a subsequent trial or hearing, or in any other civil cause or civil proceeding involving substantially the same issue; if (1) such evidence has at such former trial been reported stenographically or reduced to writing in the presence of the court; (2) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (3) **that the issue is substantially the same in both cases**; (4) **that a substantial reason is shown why the original witness or document is not produced**; and (5) that the court is satisfied that the report of such evidence taken at such former trial is a correct report.

The issues were not substantially the same, since the issues raised by the last six allegations of negligence in Petitioner's Complaint were abandoned at the second trial, and furthermore, the Florida law required that **a party seeking to introduce the testimony given at a former trial must first introduce preliminary evidence of the existence of the reasons for its introduction. Habig** v. **Bastian,** 117 Fla. 864, 158 So. 508. Petitioner produced no preliminary evidence to show a substantial reason why the original witnesses who testified in the former trial were not available and could not be produced.

The law is well settled by the decisions of this Court that unless a decision upon a Federal question was actually necessary to the judgment, this Court will not entertain jurisdiction, and even when an erroneous decision upon a Federal question is made a ground of the judgment, if the judgment is also supported upon another ground which is adequate by itself, and which contains no Federal question, this Court will likewise not entertain jurisdiction. **Arkansas Southern Railroad Company** v. **German National Bank** (1907) 207 U.S. 270, 28 S. Ct. Rep. 78, 52 L. Ed. 201; **Southwestern Bell Telephone Co.** v. **State of Oklahoma** (1938) 303 U.S. 206, 58 S. Ct. Rep. 528, 82 L. Ed. 751. In the **Southwestern Bell Telephone** case, this Court stated (303 U.S. at pp. 212, 213):

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure v. Gaillard, 127 U.S. 216, 234, 8 S.Ct. 1053, 32 L.Ed. 125; Johnson v. Risk, 137 U.S. 300, 306, 307, 11 S.Ct. 111, 34 L.Ed. 683; Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 295, 297, 11 S.Ct. 528, 35 L.Ed. 193; Whitney v. California, 274 U.S. 357, 360, 361, 47 S.Ct. 641, 642, 643, 71 L.Ed. 1095; Lynch v. New York, 293 U.S. 52, 54, 55 S.Ct. 16, 17, 79 L.Ed. 191."

There being an adequate non Federal ground to support the judgment of the Florida court for the Respondent, and a decision of the Federal question not being necessary to the determination of this cause, this Court is without jurisdiction to entertain the Petition for Writ of Certiorari, and the Writ should be discharged.

VII. CONCLUSION.

There is nothing here involved except an attempt on the part of Petitioner to convert a labor grievance into a basis for liability under the Federal Employers' Liability Act. Petitioner refused to proceed to trial on what the Florida Appellate Court held to be triable issues under the Federal Employers' Liability Act, and if Petitioner ever had any possible claim under the Federal Employers' Liability Act, with respect to the manner of giving the test, it was lost when Petitioner expressly abandoned his oral amendment to his Complaint, made after the remand of this cause to the trial court for a re-trial, to the effect that Respondents were negligent in ordering the test when they knew Petitioner was in a weakened physical condition. The right to give the test or require the test, being the sole issue upon which Petitioner elected to stand, clearly presented no justiciable issue under the Federal Employers' Liability Act, but was correctly held by the District Court of Appeal of Florida, Third District, to be a matter cognizable only under the Railway Labor Act. This case involves no new or novel principle of law and certainly conflicts in no way with any of the decisions of this Court or of any other Federal Court.

There being a non Federal ground which supports the judgment of the Florida court, and that court's de-

cision of the Federal question not being necessary to the determination of this cause, this Court is without jurisdiction to entertain the Petition for Writ of Certiorari, and to review the Judgment of the Florida Appellate Court.

Respondents respectfully submit that the Writ of Certiorari should be discharged and the judgment of the District Court of Appeal of Florida, Third District, affirmed.

Respectfully submitted,

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and

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E. F. P. BRIGHAM

By _____
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, in compliance with Rule 33 of the Supreme Court Rules, a copy of the Brief of Respondents and Appendix to Brief of Respondents was served upon William S. Frates of Nichols, Gaither, Green, Frates & Beckham, Esqs., Attorneys for Petitioner, 1111 Brickell Avenue, Miami 32, Florida, by depositing same in a U. S. Mail Box with first class postage prepaid addressed to said counsel of record at his above post office address this 25 day of January, 1961.

E. F. P. BRIGHAM

IN THE

Supreme Court of the United States

No. 313

BERT SMITH,

Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, as Trustees of the Property of the FLORIDA EAST COAST RAILWAY COMPANY, a Florida Corporation,

Respondents.

APPENDIX TO BRIEF OF RESPONDENTS

I.

PERTINENT PROVISIONS OF THE RAILWAY LABOR ACT, TITLE 45 U.S.C.A.:

"§ 151a. General purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of em-

ployees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

§ 152. General duties—Duty of carriers and employees to settle disputes

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

"....

"§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

"First. There is established a Board, to be

known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934, ..."

" . . . .

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the

appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: **Provided, however,** That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties of either party to the dispute may certify that fact to

the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum

to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

" . . . .

"§ 154. National Mediation Board—Board of Mediation abolished; National Mediation Board established; composition; term of office: qualifications; salaries; removal

"First: The Board of Mediation is abolished, effective thirty days from June 21, 1934, and the members, secretary, officers, assistants, employees, and agents thereof, in office upon June 21, 1934, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this chapter had not been passed. There is established, as an independent agency in the executive branch of the Government, a board to be known as the 'National Mediation Board', to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The terms of office of the members first appointed shall begin as soon as the members shall qualify, but not before thirty days after June 21, 1934, and expire, as designated by the President at the time of nomination, one on February 1, 1935, one on February 1, 1936, and one on February 1, 1937. The terms of office of all successors shall expire three years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the

term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor. Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board. Two of the members in office shall constitute a quorum for the transaction of the business of the Board. Each member of the Board shall receive basic compensation at the rate of $15,000 per annum, together with necessary traveling and subsistence expenses, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while away from the principal office of the Board on business required by this chapter. No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

"All cases referred to the Board of Mediation and unsettled on June 21, 1934, shall be handled to conclusion by the Mediation Board.

"A member of the Board may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause.

" . . . .

"§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty

days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

II.

EXCERPTS FROM AWARDS OF NATIONAL RAILROAD ADJUSTMENT BOARD:

"Award No. 6202
Docket No. 12112

"NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

"PARTIES TO DISPUTE:

"ORDER OF RAILWAY CONDUCTORS

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS AND PACIFIC RAILWAY COMPANY

"STATEMENT OF CLAIM: Claim that Conductor-brakeman M. A. Hughes should be allowed to exercise his seniority as train bag-

gageman and should be paid for time lost account deprived of service from January 16, 1941, and subsequently until he is allowed to exercise his seniority as train baggageman.

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers, and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The evidence of record in this docket shows that Conductor-Brakeman Hughes voluntarily left respondent carrier's service, April 13, 1930, account physical disability, and has not been in railroad service since that time, although his seniority as conductor-brakeman-baggageman has been perpetuated on the roster. His physical disability is acknowledged by all parties concerned, but it is contended by petitioner that he should be given a field test to ascertain whether or not he is physically able to perform the duties of train baggageman, and, if so, be allowed to exercise his seniority in that capacity.

"Without regard to Paragraph (a), Articles 40-41 of respective agreements here in evidence, reading:

> " 'The proper performance of their duties will be considered satisfactory test of the physical ability of all employes now in service.' "

and without interpreting said rule or establishing precedent thereunder, the Division holds that in the instant case, the result of a practical field test of sufficient duration, under average service conditions, under observation of representatives of the respective parties to this dispute, should be an acceptable determination of claimant's qualifications for service as a train baggageman.

"It is accordingly held that complainant Hughes shall be permitted to exercise his seniority as train baggageman, without pay for any time lost, provided he shall qualify for such service by a practical field test of sufficient duration, under average service conditions, under observation of represenatives of the respective parties to this dispute, which test shall be promptly accorded him.

"AWARD.

"Claim disposed of per Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Secretary

"Dated at Chicago, Illinois, this 11th day of November, 1941."

"Award No. 6383
Docket No. 13261

"NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

"The First Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS

"STATEMENT OF CLAIM: Claim of Yardman C. H. Hackler for time lost by reason of being deprived of service December 16, 1940, and on all subsequent dates until permitted to exercise his seniority as yard foreman and/or helper.

" . . . .

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"The Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"Article 2-(b) of the Yard Agreement provides that yardmen may exercise their seniority for permanent vacancies as switchtenders, their seniority as such to date from November 19 ,1919; but it does not provide that they shall thereby lose their seniority as yardmen. Therefore claimant was entitled to exercise his seniority as yard foreman and/or helper, subject, under the circumstances, to the demonstration of the proper performance of his duties, under Article 25-(a).

"Due to his rating of 50% permanent disability there is no presumption of his ability to perform the duties, and he is therefore not prima facie entitled to pay for the time lost. But he is entitled to a reasoanble field test, and upon demonstrating his fitness he is entitled: (1) to exercise his seniority as claimed; and (2) to receive pay for all time lost, with reduction for other wages received from the carrier, in the absence of proof that his condition was not materially worse when the field test should have been given.

"The evidence of record and the rules cited supported the claim, subject to the above conditions.

"AWARD

"Claim sustained in accordance with above Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Secretary

"Dated at Chicago, Illinois, this 29th day of January, 1942."

"Award No. 12882
Docket No. 20814

"FIRST DIVISION

"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois.

"The First Division consisted of the regular members and in addition Referee George E. Bushnell when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE TEXAS AND PACIFIC RAILWAY COMPANY

"STATEMENT OF CLAIM: Claim of Conductor J. W. Rothwell, employed Fort Worth-Texarkana via Min-

eola Seniority district, that he should be allowed to exercise his seniority, first on position as passenger conductor, second on position as train Baggageman in accordance with his seniority rights and/or rights to service as such and his request dated October 3, 1944, and pay for time lost as results of his request being denied by Superintendent R. C. Parker, September 7, 1944 forward. (Carrier's File T-19172.)

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"The First Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"This claim arises out of the denial of claimant's request to be allowed to exercise his seniority, first as a passenger conductor, and second, as train baggageman. His injury while in service as a freight conductor on January 12, 1944 necessitated amputation of his left foot, and later a higher amputation. He received $11,500 in settlement of his claim and executed a release therefor on October 9, 1944. This release does not recite total or permanent disability nor does the record indicate that claimant asserted such a condition, hence it cannot be held that the statement was based on that contention.

"Prior to settlement for his injury, he verbally requested permission to exercise his seniority on September 6, 1944. This was denied orally by the superintendent on September 7, and again in writing on October 20, following claimant's formal written request on October 3.

"The Vice President on appeal held on December 13 that his 'injuries totally and permanently disabled him from performing any character of train service,' and that by his settlement he ceased to be an employe of the company.

"The carrier moved this Division to dismiss this ex parte submission on four grounds which may be summarized as follows:

"(1) The Division lacks jurisdiction in the premises under the Railway Labor Act.

"(2) The dispute, if any, arises out of an injury and not a grievance.

"(3) The claim is barred by the terms of the written release.

"(4) Claimant relinquished all employment rights upon execution of the release in the light of his knowledge of his permanent physical disqualification.

"Claimant also seeks 'pay for time lost as a result of his request being denied, * * *.'

"Decision is controlled by the language of the release. The rule heretofore followed is — if the release is broad

enough to include the release of any claim growing out of the loss of seniority rights, the claim will be denied. If the release is special and relates only to the accident, it cannot be said to constitute a release of seniority rights and the claim will be sustained. See Award No. 4931, Award No. 5299 (Summons). See also Award 8265 (Simmons), Carrier's dissent, and sustaining opinion therewith.

"Claimant was not, by the carrier's own admissions, separated from the service when he requested permission to exercise his seniority on September 6, 1944. His separation, if any was not effected, according to carrier's statement, until October 19, 1944. Hence the Division has jurisdiction. Nor did it lose jurisdiction by reason of the release, which is special in nature and confined to the injury. Claimant did not therein waive any seniority rights and only denied 'promise of employment,' and 'other agreement not herein expressed.'

"Under the interpretation to Award 8265, claimant should be 'reinstated to his former seniority standing.' His restoration to service must, however, depend upon his ability to perform that service. This cannot be determined on this record by this Division, but must abide the usual and customary practice on the property and under the terms of the working agreement.

"Nor, under the circumstances here disclosed, is claimant entitled to compensation until his ability to perform service is determined.

"AWARD

"Claim sustained, but only as to restoration to former seniority standing, and without prejudice to appropriate further action on the property, and also without payment for time lost.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 26th day of July, 1949."

"Award No. 14218
Docket No. 23644

"FIRST DIVISION
"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois

"The First Division consisted of the regular members and in addition Referee Francis J. Robertson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE NEW YORK CENTRAL RAILROAD COMPANY
—BUFFALO AND EAST

"STATEMENT OF CLAIM: Claim of C. E. Nellis, formerly employed as Yard Helper at Watertown for reinstatement to active service as switchtender with seniority unimpaired based on Schedule Articles 40 (m) and 62 of the Trainmen's Agreement.

"This submission further involves a claim for payment of all time lost and vacation allotment account illegally held out of service October 30, 1946, and all subsequent dates, when a junior man was used to fill a switchtender's position in Watertown Yard.

" . . . .

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"While employed as a yard helper in Carrier's Watertown Yard, claimant suffered an injury which resulted in the amputation of his left leg. He filed suit against Carrier and the same was amicably adjusted. Thereafter, he sought to displace a switchtender under a provision

of the applicable agreement which, among other things, in effect, provides that when incapacitated for the duties of a foreman or helper, such employes will have the right to displace any able-bodied switchtender who entered the service subsequent to January 1, 1919, and who is junior in service. He was denied displacement rights on the ground that he was not physically able to perform the duties of the position.

"The discipline or investigation rule has no application to the facts of record in this docket, despite employes' contention to the contrary.

"Primarily, judgment in selecting and maintaining competent personnel for the operation of the railroad rests with the Carrier. However, that judgment may not be arbitrarily or capriciously exercised so as to deprive an employe of the rights which his collective bargaining agreement affords. Here, it is not denied that in the presence of Carrier officials claimant exhibited considerable dexterity of locomotion unusual in one so handicapped. Yet, Carrier has taken the position, in effect, that solely because of the injury suffered, without physical examination at the time of attempting to exercise his displacement rights, claimant is physically incapable of performing the duties of the position for which he has applied.

"In accordance with the principles stated in the preceding paragraph we find that claimant should be afforded a physical examination by Carrier's medical department to determine his ability to discharge the duties of the involved switchtender position. If the employes are dissatisfied with the findings of the medical department, then claimant should be submitted to an examination by a

board of three competent physicians, selected one by the Carrier, another by the Organization, and the third by the two thus selected; their findings to be used as a basis for determining his competence to fill the position. If found qualified, he should be permitted to exercise his displacement rights in the position sought and reimbursed for wage loss suffered commencing from October 30, 1946, less earnings in outside employment.

"AWARD

"Claim disposed of as per Findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMENT BOARD

"ATTEST: (Sgd.) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 25th day of January, 1951."

"Award No. 14281
Docket No. 23027

"FIRST DIVISION

"NATIONAL RAILROAD ADJUSTMENT BOARD
39 South La Salle St., Chicago 3, Illinois.

"The First Division consisted of the regular members and in addition Referee LeRoy A. Rader when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"THE BALTIMORE AND OHIO RAILROAD COMPANY

"STATEMENT OF CLAIM: Request of restoration of Trainman G. C. Stewart to passenger service.

"JOINT STATEMENT OF FACTS: In April, 1945, Trainman G. C. Stewart, who had been working in Brunswick Yard, made reuest on Trainmaster to take turn as passenger flagman. Pursuant with that request, he was given an order by Trainmaster J. F. Stevens, dated April 20, 1945 to learn the necessary territory. After being examined on the road by Trainmaster, he was then assigned as passenger flagman to trains nos. 11 and 2nd 8, which he worked for six round trips. On completion of the sixth trip he was relieved from passenger service and returned to Brunswick Yard.

"....

"FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute waived hearing thereon.

"Numerous awards are cited by the parties on this claim. A careful analysis shows distinguishing features in the fact situations.

"Employe's service dates from 1915, injured in 1922, necessitating amputation of left foot below ankle. He continued work and in 1945 requested to take turn as passenger flagman, was given order to learn necessary territory, examined and passed by Carrier's physician. After making six trips ordered to return to Brunswick Yard. No explanation for change appears in the record.

"Carrier contends safety to traveling public necessitated action taken by reason of injury and age.

"If, as alleged, employe is obviously unqualified, there is no valid reason for failure to permit adequate proof of the fact, rather than reliance on an unproved conclusion.

"Employe worked with artificial appliance for 23 years. In cases involving managerial prerogatives, the exercise of that right must be reasonable.

"Six years have elapsed since trial runs were made. Restoration of requested service depends on ability to perform. If employe is still interested, he should be given proper consideration, based on competent medical standards.

"AWARD

"Claim sustained as per findings.

"BY ORDER OF FIRST DIVISION
"NATIONAL RAILROAD
ADJUSTMEN BOARD
"ATTEST: (Sgd.) T. S. McFarland
"Executive Secretary

"Dated at Chicago, Illinois, this 20th day of February, 1951."

"Award No. 977
Docket No. 973

"NATIONAL RAILROAD ADJUSTMENT BOARD
"FOURTH DIVISION

"The Fourth Division consisted of the regular members and in addition Referee Emmett Ferguson when award was rendered.

"PARTIES TO DISPUTE:

"BROTHERHOOD OF RAILROAD TRAINMEN

"ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

"STATEMENT OF CLAIM: Request that A. B. Martin, Yardmaster, Shreveport, Louisiana, be permitted to return to service as yardmaster, and paid in the amount

he would have earned had he been permitted to return to the service in keeping with his request October 1, 1952.

". . . .

"OPINION OF BOARD: There is one principal fact upon which the parties agree in this docket. That is, the claimant has suffered the loss of both legs, one above the knee and the other below the knee. There is no agreement whatever on the claimant's present ability to use his prosthetic appliances, or the percentage of his disability. The carrier, on the one hand, insists that a man with both legs amputated is unable to fulfill 100% of the duties of the job of yardmaster. The claimant's organization, on its side, urges strongly that a yardmaster's work is by definition supervisory and requires the barest minimum of actual walking. To exaggerate the case, it has been said by the Brotherhood that the claimant could run this particular job of yardmaster from a wheel chair. It has been explained that the yard in question is not a large one and that there are not many workers under this yardmaster's supervision; that most of the actual work of the yard is done on a switching lead directly in front of the yard office; and that, because of the excellent recovery of the claimant and his mastery of his artificial legs, he would be able to handle this particular job with no complications.

"On the other hand, the carrier insists that a yardmaster, to be qualified must be able to meet not only the ordinary operations of his post but must, if need arise, be able to handle any extraordinary situation which might require haste and direct action outside the yard office.

"The docket indicates that the claimant herein was

provided a settlement of his personal injury claim against the carrier, but the terms of the settlement have not been brought before this Board. Accordingly, we refuse to conjecture about any claims made, assurances given, or obligations remaining on the part of either of the parties to that settlement.

"The Organization further urges that the claimant should be given an opportunity to demonstrate his yardmaster ability by actually working the job and the carrier declined to restore him to work because it was certain in advance that the claimant would not be able to function properly and safely.

"The organization cites a comment by the company physician addressed to the claimant to the effect that he saw no reason why the claimant could not return to work as a yardmaster. We hesitate also to intrude in the relation between physician and patient, because it must certainly be true that it is a physician's duty to restore the confidence of one as seriously injured as the present claimant.

"Finally, we note that the carrier did on January 18, 1954, seriously consider the organization's request for an inspection of the claimant and his ability to use his artificial limbs; and that the claimant did not refuse such inspection, but preferred to be represented at the demonstration by his organization.

"From all of this it appears that both the organization and the carrier have been protecting their respective positions so well that the injured man has been forced to present his case here without being able to show his actual

skill in getting about. This Board is of the opinion, therefore, that it would be unwise to order the claimant back to work while a doubt still exists. The important thing is that both the organization and the carrier should, in fairness and impartiality, try to salvage the individual whose willingness in the face of adverse circumstances should be encouraged so long as he is able to do his job completely and without danger to himself and others. We note that the job he seeks is that of extra yardmaster, which would likely require his use on all three shifts, which is a further complicating factor. At this time this Board refuses to sustain the claim advanced, but recommends to the parties that a demonstration of the claimant's fitness and ability be arranged off the property, preferably with competent, disinterested, medical advice; and an appraisal of his fitness and ability be fairly arrived at by the parties themselves.

"FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute waived right of appearance at hearing thereon.

"AWARD

"Claim denied with recommendations.

"NATIONAL RAILROAD
ADJUSTMENT BOARD

"By Order of Fourth Division
"ATTEST: R. B. Parkhurst
Secretary

"Dated at Chicago, Illinois, this 4th day of June, 1954."

AWARD 17523
Docket 32053

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

PARTIES TO DISPUTE:

SWITCHMEN'S UNION OF NORTH AMERICA

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

STATEMENT OF CLAIM: "(1) Request that Oscar S. Simmons, formerly employed as yardman, Oakland Yard Western Division, and presently holding seniority rights as such on the Western Division, be allowed to exercise seniority on herder assignments.

"(2) Claim is made for compensation for all time lost since date requesting to be marked for service August 25, 1952."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant's right arm was amputated immediately below the elbow as a result of an accident while working as a yardman. He sought to exercise yardman's seniority on certain herder assignments which the carrier refused because of his physical disability. He claims payment for all time lost since August 25, 1952, the date his request for herder assignments was denied.

The claim is principally based on a letter agreement between the carrier and the trainmen's organization dated January 8, 1942, wherein three switch tenders at West Oakland Yard were re-classified to herder's positions and compensated accordingly. A provision of that agreement is that any vacancies in the positions mentioned will be filled by yardmen holding seniority on the Yardmen's Seniority Roster.

The carrier contends that the 1942 agreement dealt with a special situation and did not contemplate that vacancies in such jobs would be filled by physically disabled yardmen. Claimant argues that these positions have been filled for many years by three disabled employes who are

not required to participate in switching moves made by yard crews (such as is generally required of herders) and he is physically qualified to fill one of these positions.

The record shows that the three disabled employes covered by the 1942 letter agreement had worked these jobs as switchtenders for many years prior to 1942, and that they were re-classified as herders during World War II when there was a manpower shortage and increased business. It was provided that they would not acquire seniority as yardmen and were not subject to displacement as yardmen.

In the normal course of their duties, herders are required to get on and off engines and cars, couple and uncouple engines and cars, give signals and assist yard crews when not otherwise engaged in their normal work. The risk involved in such work is obvious and it is plain to be seen that a man without the use of both arms would be in a position of great danger to himself and to others working with him. The carrier was therefore warranted in refusing to permit claimant to work at the customary herder's assignment. We are also of the opinion that the record amply supports the carrier's position that claimant is not entitled to the benefits of the letter agreement of January 8, 1942. The parties were there dealing with a specific situation and we find no basis in that agreement for the contention that a physically disabled yardman is entitled as a matter of right to fill a vacancy in those assignments. It is the undoubted prerogative of management to determine the physical qualifications of its employes and the January 8, 1942 agreement affords no proper basis for implying that it thereby intended to surrender that right with respect to the three positions covered thereby.

Under applicable rules on this property, disabled yardmen are only given preference to vacancies in positions of switchtenders. No such vacancies were available and in lieu thereof the carrier offered claimant an opportunity to qualify as a towerman or clerk but he declined to do so. Since he is still carried on the seniority roster, it may be assumed that if he desires to do so, he will be given an opportunity to fill a position for which he is physically qualified.

AWARD: Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June, 1956.

Award No. 8394
Docket No. SG-8341

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY

OPINION OF BOARD: Claimant entered Carrier's service as a Signalman in October 1944. On the basis of the physical examination given him at the time of employment, Claimant was disqualified by Carrier's Chief Surgeon on the ground of defective eyesight. The examination revealed Claimant's vision in left eye was 20/200, with correction not possible. His vision in right eye was 20/20 when corrected with lenses. The Assistant Engineer of Signals nevertheless urged that Claimant be hired, due to the prevailing shortage of personnel with signal experience such as Claimant possessed. The matter was referred to Carrier's General Manager, who granted permission to employ Claimant provided he passed a visual field test. He was given such test and passed "one hundred percent", according to the Chief Engineer's report. The field examination consisted of a daylight test with green, yellow and red flags and hand signal to be identified at distances of 800, 1400 and 2000 feet; and a night test using green, yellow, red and white lights at the same distances.

In July 1954 Claimant was given another medical examination which indicated left eye 20/200, with correction not possible; right eye 20/100, but 20/20 corrected. On the basis of these results another field test was recommended for Claimant, said test being given in October 1954, with the Local Chairman present. Carrier's report indicated Claimant failed to correctly identify certain colors at particular distances up to 2000 feet in both the day and night parts of the test. By letter dated December 13, 1954 Carrier notified Claimant he was being removed from service on the ground that he was not qualified to safely perform his duties as a Signalman. Carrier suggested he apply to the Railroad Retirement Board for an occupational disability annuity. Claimant did so, and was granted a full

disability annuity January 1, 1955. In the meantime, however, Organization's General Chairman had protested Claimant's removal from service and requested that another field test be given. Said test was administered in March 1955. Claimant made all of the proper identifications in the daylight part of the test. In the night part, however, he failed to properly distinguish certain colors at distances from 1000 to 1800 feet. Both the day and night portions of this repeat test were administered in the presence of the General Chairman and the Local Chairman.

This last test served to conform Carrier's findings with respect to the October 1954 test, insofar as Claimant's ability to distinguish lights of various colors at night is concerned. His duties as a Signalman included the operation of a motor car alone, day or night. The Organization does not contend Claimant correctly made all of the color identification in the last field test given him. It is urged, however, that his vision was not sufficiently faulty to warrant removal from his Signalman's job. During the progressing of this claim Carrier offered to restore Claimant to active service as an hourly rated gang Signalman where he would work with other employes and not be permitted to operate a motor car alone. The Organization made a counter proposal which Management was unwilling to accept.

The Carrier is charged with the responsibility of maintaining safe and efficient operation of its facilities. It has a heavy obligation to provide for the safety of its employes and of other persons entrusted to its care. In a matter such as the instant case, this Board should not set aside Management's judgment unless there is a showing of action that is arbitrary, capricious or evidentiary of

bad faith. No such showing is made by the record before us. Thus the claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of THIRD DIVISION

Attest: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 10th day of July, 1958.

Award No. 1103
Docket No. 1101

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

PARTIES TO DISPUTE:

ASSOCIATED MARITIME WORKERS LOCAL NO. 1,

INTERNATIONAL ORGANIZATION MASTERS, MATES AND PILOTS INC.

BUSH TERMINAL RAILROAD COMPANY

STATEMENT OR CLAIM: (a) Unwillingness of Carrier to reinstate Floatman-Deckhand A. Dubetsky to his former position, after being discharged from the U. S. Public Health Service Hospital, Staten Island 4, N.Y.; wherefore that

(b) Said Floatman-Deckhand A. Dubetsky be reinstated to service; and that

(c) Said Floatman-Deckhand A. Dubetsky be reimbursed for all wages lost as of May 20th, 1955 until returned to service.

" . . .

OPINION OF BOARD: Claimant, Andrew Dubetsky, 57 years old, began working for the Carrier on the 27th day of December, 1938, 15 years and 2 months before his first heart trouble that took him out of service; the Claimant returned to work for Carrier the last time on the 18th day of October, 1954, worked for about nine days and returned to the hospital with a heart condition.

The record reveals that from October 27, 1954, to the 10th day of December, 1954, Claimant was a patient at the U. S. Public Health Service Hospital for his heart condition. On January 19, 1955, and on April 22, 1955, Claimant was examined by the doctors at the said hospital and was found to be unable to work. On the 23rd day of May, 1955, at the request of G. M. Smith, Superintendent of Yard and Marine Operations for Carrier, Claimant was examined by Dr. Barnard Goodman, Carrier's Physician, who reported Claimant was unfit for duty. On the 6th day of June, 1955, Claimant was again examined by Dr. Goodman, who reported Claimant still not acceptable for duty. Then on June 29, 1955, Claimant was examined by a neutral doctor who reported that Claimant could work at a desk job, but could not do a job other than that which "requires anything more than a very minimal degree of effort." Then on the 20th day of October, 1955, a Dr. Parrish pronounced Claimant fit for duty; on the 24th day of October, 1955, Dr. Goodman reported Claimant not fit for duty.

The claim is that Floatman-Deckhand A. Dubetsky be reinstated to service and be reimbursed for all lost time.

This Board is well aware of the firmly established and prevailing rule that Carrier is possessed with certain discretionatory powers in establishing and determining the fitness physically of its employes for service and that the exercise of those powers will not be disturbed in the absence of a clear affirmative showing that they have been exercised in an unreasonable, arbitrary and capricious manner, and that the Board does not in such circumstances substitute its judgment for that of skilled medical men.

Many, many cases have been remanded in this and other Divisions of the Railroad Adjustment Board for the reason that only Carrier's chosen medical men had examined the claimants, and the different opinions have set forth that was the reason for such remanding.

But in the instant case, Carrier called on its doctor and Claimant's doctor to choose a neutral doctor to examine Claimant, and the neutral doctor pronounced Claimant fit only for a desk job or very light duty.

It cannot be said that Carrier has been harsh or lacking in reasonable consideration for Claimant.

This Board cannot help but be very sympathetic to the Claimant and his most important problem, but neither can the Board be unmindful of the tremendous responsibility that rests upon Carrier where Claimant's life and the lives of others, are involved, to do everything in its power to protect those lives as well as its physical property. Not only does Carrier have a right to do so, it has grave duty to do so.

Therefore, this Board holds that Carrier's action in determining the physical fitness of Claimant for duty under competent medical evidence was not unreasonable, arbitrary or capricious, and the claim must be denied.

FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute waived right of appearance at hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: R. B. Parkhurst
Secretary

Dated at Chicago, Illinois, this 18th day of April, 1956.